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**The Drafting of a Law against Discrimination on the Grounds of
Racial or Ethnic Origin in Germany – Constraints in Constitutional
and European Community Law**

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The Drafting of a Law against Discrimination on the Grounds of Racial or Ethnic Origin in Germany – Constraints in Constitutional and European Community Law

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On 29 June 2000 the European Council adopted the Race Equality Directive, which outlaws, inter alia, direct and indirect discrimination based on racial or ethnic origin regarding access to employment and supply of goods and services, which are available to the public. EC member states now have to adopt laws to comply with the directive. Thus, the German Federal Ministry of Justice introduced a Discussion Draft Law on the Prevention of Discrimination in the Private Sector. The publication of the discussion draft led to a debate among scholars and players in the field of anti-discrimination. Some scholars endorsed the draft law. Other authors claimed that the draft law violates not only the constitution but also common sense. This article gives an overview of current German regulations against discrimination on the grounds of racial or ethnic origin, the discussion on the draft law and its compatibility with constitutional and European Community law. It will show, that most of the arguments against the draft law are unfounded. The author argues that the primary basis for an assessment of the compatibility with higher-ranking law is European Community law and not German constitutional law. However, a carefully drafted discrimination law in the sector of private and labour law would be consistent with the Basic Law. Owing to the recent election campaign in Germany, the adoption of the Draft Law was postponed. Thus, the author also discusses consequences deriving from European Community law, should it be the case that Germany fails to implement the Race Equality Directive in the period prescribed by the directive.

I. Introduction

In 2000, the European Council adopted two directives, with the aim of combating “discrimination on the grounds of racial or ethnic origin”¹ and “discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation”.² One of the two pieces of legislation, the Race Equality Directive (Directive 2000/43/EC) outlaws, *inter alia*, direct or indirect discrimination based on racial or ethnic origin regarding access to employment, including selection criteria, recruitment conditions and promotion; membership in an organization of

* The author would like to thank Dr Alexander H. E. Morawa and Ms Hannah McGlue for their valuable comments on this article.

¹ See Art. 1 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19 July 2000, 22.

² See Art. 1 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 2 December 2000, 16.

workers or employers; social protection; education and access to and supply of goods and services, which are available to the public.³

EC member states now have to adopt laws, regulations and administrative provisions to comply with the directives. Accordingly, in December 2001 the German Federal Ministry of Justice introduced the “Discussion Draft Law on the Prevention of Discrimination in the Private Sector”.⁴

Although one major aim of the German government is the protection of minorities,⁵ in June 2002 a study prepared for the European Monitoring Centre on Racism and Xenophobia came to the conclusion that the compatibility of German laws in many sectors with the directives should be reviewed.⁶ According to Art. 6 of the Race Equality Directive member states may introduce or maintain acts, which go beyond the scope of the directive. In Germany, so far there is no provision, which is more favourable regarding equal treatment than the regulations of the directives.⁷

The purpose of this article is to give an overview of current German regulations against discrimination on the grounds of racial or ethnic origin, draft legislations and their compatibility with constitutional and European Community law. The article will focus on rules against discrimination in private and labour law.⁸

³ Art. 3 of the Council Directive 2000/43/EC. A detailed overview of the scope of the directive is given in Rainer Nickel, “Handlungsaufträge zur Bekämpfung von ethnischen Diskriminierungen in der neuen Gleichbehandlungsrichtlinie 2000/43/EG”, 54 *Neue Juristische Wochenschrift* (2001), 1668-1672 and Gabriel N. Toggenburg, “The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe”, 1 *European Yearbook of Minority Issues* (2001/2), 231-244.

⁴ Bundesministerium der Justiz, Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierung im Zivilrecht, (10 December 2001). Earlier proposals to adopt special laws against racial discrimination were made in 1994 and 1995. None of them was adopted, see Peter Rädler, “Gesetze gegen Rassendiskriminierung”, 30 *Zeitschrift für Rechtspolitik* (1997), 5.

⁵ See Coalition Agreement for the legislative period 1998-2002 (20 October 1998): “10. Rights of Minorities: The new Federal Government wants to protect minorities and wants to achieve their equal treatment and social participation. No one must be discriminated against on grounds of his disability, origin, colour, ethnic origin or sexual orientation as gay or lesbian.” and Coalition Agreement for the legislative period 2002-2006 (16 October 2002), 64: “Promotion of tolerance, respect of rights of minorities and self-determination of human beings are leading principles of our policy. [...] We plan to extend rights of political participation and civil rights and to eliminate discrimination.” (translation by the author.)

⁶ Matthias Mahlmann, “Anti-Discrimination Legislation in EU Member States – A Comparison of National Anti-Discrimination Legislation on the Grounds of Racial or Ethnic Origin, Religion or Belief with the Council Directives – Germany, Migration Policy Group” In *European Monitoring Centre on Racism and Xenophobia* edited by Jan Niessen and Isabelle Chopin (Vienna, 2002), <http://www.eumc.eu.int/publications/Article13/Germany.pdf>.

⁷ *Ibid.*, 24.

⁸ An overview of criminal law provisions against discrimination, their application and effectiveness is given in the Thirteenth/Fourteenth Periodic Report to the Committee on the Elimination of Racial Discrimination (CERD), UN Doc. CERD/C/299/Add. 5 (21 October 1996), paras. 44-52 and the

II. Laws against Discrimination on the Grounds of Racial or Ethnic Origin

A. The Basic Law (*Grundgesetz*)

The starting point for an overview of German regulations against discrimination must be the German Constitution (Basic Law). According to Art. 3 (1) of the Basic Law, “[a]ll human beings are equal before the law”. Art. 3 (3) of the Basic Law outlaws discrimination based on sex, parentage, race, language, homeland and origin, belief, religious or political opinions.⁹ The primary aim of Art. 3 (3) is to protect against discrimination by public authorities. It is well established that the basic rights in the German Constitution do not apply directly in the private sphere of the citizens. In other words, they do not have a direct horizontal effect (*direkte Drittwirkung*).¹⁰ However, the basic rights in the constitution lay down an objective value system (*objektive Werteordnung*), which influences not only legislative, executive and judicial authorities, but also the sector of private law.¹¹ Therefore, mandatory general provisions such as Section 138 and Section 826 of the Civil Code (*Bürgerliches Gesetzbuch*), which constitute part of the *ordre public* have to be interpreted in light of the objective value system set up by the basic freedoms.¹²

Art. 3 (3) (1) of the Basic Law entails not only a prohibition for public authorities to discriminate on grounds of race, homeland and origin; it also contains the constitutional mandate to enact regulations against direct racial discrimination.¹³ The prohibition of racial discrimination can also be deduced from the right to human dignity (Art. 1 of the Basic Law).¹⁴

Fifteenth Periodic Report to the Committee on the Elimination of Racial Discrimination, UN Doc. CERD 338/C/Add.14 (10 August 2000), paras. 32-35, 78-96, 106-110.

⁹ In addition, Art. 33 of the Basic Law protects applicants for a position in the public service against discrimination, see Frank Selbmann, “Some Thoughts about Access to the Public Service and Non-Discrimination” in 1 *European Yearbook of Minority Issues* (2001/2), 207, 217-8.

¹⁰ See Mahlmann, Anti-Discrimination Legislation, 10 and Nicola Vennemann, “The German Draft Legislation on the Prevention of Discrimination in the Private Sector”, 3 *German Law Journal* ((3) 1 March 2002), http://www.germanlawjournal.com/past_issues_archive.php, para. 9.

¹¹ German Federal Constitutional Court 7 BVerfGE (1958), 198, 205.

¹² *Ibid.*, 206.

¹³ Peter Rädler, *Verfahrensmodelle zum Schutz vor Rassendiskriminierung, Rechtsvergleichende Untersuchung zum Verfassungsauftrag in Art. 3 Abs. 3 GG*, (Berlin, Heidelberg, New York, 1999), 411-2.

¹⁴ See Rädler, *ibid.*, 410; Victor Winkler, “The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur”, 3 *German Law Journal* ((6) 1 June 2002), para. 6 and Fifteenth Periodic Report to the CERD..., para. 1.

B. Other Laws

In Germany, unlike in many other countries, there is no act which deals exclusively with non-discrimination. In 1997, the Committee on the Elimination of Racial Discrimination (CERD) expressed its concerns because Germany failed to adopt comprehensive legislation to comply with Articles 2 (1) (d) and 5 (e) (i) of the International Convention on the Elimination of All Forms of Racial Discrimination in the private sector and recommended that Germany should enact such a law.¹⁵

Although an anti-discrimination law has not been adopted, several laws in the private and public sector outlaw acts of discrimination:¹⁶ Section 826 of the Civil Code gives the right to compensation for damages suffered from an intentional, unethical injury (*vorsätzliche, sittenwidrige Schädigung*). In German case law Section 826 already served as a tool to compensate for discrimination suffered on grounds of sexual orientation.¹⁷ Regulations which give the right to equal access to the public service can be found in the acts on public officials at the federal and at the *Land* level. Section 75 (1) of the Works Council Constitutions Act (*Betriebsverfassungsgesetz*) obliges employers and works councils to treat employees equally and to prevent discrimination based on descent, religion, nationality, origin, political or trade union opinion or activity, gender or sexual identity. Unfortunately, Section 75 of the Works Council Constitutions Act does not apply to the recruitment process.¹⁸ Therefore, so far applicants for positions in the private sector are not protected against racial discrimination.

III. The Discussion Draft Law on the Prevention of Discrimination in the Private Sector

A. Drafting History

In case law and scholarly writing Section 826 of the Civil Code has not been interpreted consistently.¹⁹ The Federal Ministry of Justice deemed Section 826 of the Civil Code therefore insufficient to prevent racial discrimination and prepared a Draft

¹⁵ Concluding Observations of the Committee on the Elimination of Racial Discrimination, Germany, UN Doc. CERD/C/304/Add.24 (23 April 1997), paras. 17 and 20.

¹⁶ A more detailed overview is given in Mahlmann, *Anti-Discrimination Legislation...*, 15-22.

¹⁷ See Bundesministerium der Justiz, *Diskussionsentwurf...*, 18 and Vennemann, "The German Draft Legislation...", paras. 12-13.

¹⁸ Mahlmann, *Anti-Discrimination Legislation...*, 12.

¹⁹ See Vennemann, "The German Draft Legislation...", para. 13-14.

Law on the Prevention of Discrimination in the Private Sector to comply with the private law related part of the Race Equality Directive. The government intends to implement labour law related provisions in Directives 2000/43 and 2000/78 in a separate law.²⁰ In the Coalition Agreement of 16 October 2002, it was decided to prepare and to adopt such a law.²¹

B. Contents of the Draft

The Ministry of Justice planned to introduce a new sub-chapter concerning regulations against discrimination in the Civil Code. It therefore followed the traditional German approach of legislative drafting according to which all of the central provisions in private law should be included in the Civil Code. The core of the Draft Law on the Prevention of Discrimination in the Private Sector consists of five sections, which can be summarized as follows:

1 Prohibition of Discrimination and Justified Differentiation (Draft Section 319a and 319d of the Civil Code)

Draft Section 319a (1) (1) (a) of the Civil Code prohibits harassment and direct or indirect discrimination on grounds of gender, race, ethnic origin, religion or belief, disability, age or sexual identity regarding conclusion, termination and content of contracts, which are offered to the public. According to Draft Section 319a (1) (1) (b) of the Civil Code, direct or indirect discrimination and harassment regarding contracts about occupation, healthcare and education are prohibited. Further, equal access to organizations, whose members belong to a particular profession is guaranteed.²² Section 319a applies neither to employment contracts and access to unions and employers organizations nor to family and inheritance law.²³ Section 319d defines grounds of differentiation, which are permissible.²⁴

²⁰ The implementation process for Directive 2000/43/EC has to be completed by 19 July 2003; for Directive 2000/78/EC by 2 December 2003.

²¹ Coalition Agreement (16 October 2002), 13.

²² Draft Section 319a (1) (2).

²³ Draft Section 319a (2) and (3).

²⁴ This issue is discussed in Herbert Wiedemann and Gregor Thüsing, "Fragen zum Entwurf eines zivilrechtlichen Anti-Diskriminierungsgesetzes", *Der Betrieb* (2002), 463, 467-9.

2 Definitions (Draft Section 319b of the Civil Code)

Draft Section 319b of the Civil Code defines direct discrimination, indirect discrimination and harassment. Apart from the grounds of discrimination the definitions given in Draft Section 319b are similar to the definitions in Art. 2 of the Race Equality Directive.

Direct discrimination occurs when one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds mentioned in Section 319a.²⁵ Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons on grounds mentioned in Section 319a at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.²⁶ Harassment is a conduct related to grounds mentioned in § 319a, which takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.²⁷

3 Reversed Burden of Proof (Draft Section 319c of the Civil Code)

Draft Section 319c of the Civil Code lays down a rule dealing with the burden of proof. After the adoption of the draft law in pending proceedings before courts, the victim only has to make a *prima facie* case regarding the facts from which it can be presumed that there has been a case of discrimination.²⁸ The respondent has to prove that there was no case of discrimination or that the differentiation was based on reasonable or objective criteria.

4 Compensation (Draft Section 319e of the Civil Code)

Draft Section 319e of the Civil Code gives the victim the claim for discontinuation of the discriminatory act (*Unterlassungsanspruch*), the right that the negative consequences of the act will be eliminated (*Folgenbeseitigungsanspruch*) and a subsidiary claim for pecuniary damages.

²⁵ Section 319b (1) of the proposed amendment to the Civil Code.

²⁶ *Ibid.*, Section 319b (2).

²⁷ *Ibid.*, Section 319b (3).

²⁸ A pure allegation would be insufficient, see Bundesministerium der Justiz, Diskussionsentwurf..., 44.

C. Criticism

The idea to include the anti-discrimination provisions in the Civil Code is not very convincing. First of all, the differentiation between occupation, where the act applies²⁹ and employment contracts, where the act does not apply,³⁰ might lead to confusion. Unfortunately, so far there is no concept to implement those provisions of the Race Equality Directive which were not mentioned in the draft law. It would have been preferable to enact a single Anti-Discrimination Act which implements the Directives 2000/43/EC and 2000/78/EC, Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)³¹ and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The introduction of several acts against discrimination is very unpractical and may lead to gaps or overlaps. A recent examination of regulations in Australia revealed that the introduction of a system of different acts of anti-discrimination laws leads to inconsistencies.³²

Unfortunately, the drafters failed to examine anti-discrimination laws in other countries at all. It is not possible to draft an anti-discrimination law without studying regulations and practices elsewhere.³³ Particularly, countries in the common law system, namely the United States, the United Kingdom, Australia and Canada have a long tradition of outlawing discrimination by special acts, which should be considered in the drafting process in Germany. One example, which could have been taken into account, is the Race Relations Act 1976 of the United Kingdom, which is, according to the European Commission against Racism and Intolerance (ECRI), one of the most comprehensive pieces of legislation dealing with racial discrimination.³⁴

Further, the proposed act failed to provide a mechanism to comply with Art. 13 of the Race Equality Directive:

²⁹ Section 319a (1) (1) (b) of the proposed amendment to the Civil Code.

³⁰ *Ibid.*, Section 319a (2).

³¹ ETS No. 177 (not yet in force).

³² Sarah Pritchard, "Approaching its Use-by Date? National Enforcement Mechanism: The Case of Australia", in Titia Loenen and Peter R. Rodrigues (eds.), *Non Discrimination Law: Comparative Perspectives* (The Hague/London/Boston, 1999), 365, 378.

³³ See Wiedemann and Thüsing, "Fragen zum Entwurf...", 470.

³⁴ European Commission against Racism and Intolerance, ECRI's country-by-country approach, Vol. IV, CRI(99)6 (Strasbourg, 26 January 1999), 81, 84.

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:
 - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
 - conducting independent surveys concerning discrimination,
 - publishing independent reports and making recommendations on any issue relating to such discrimination.³⁵

Germany has therefore the legal obligation to establish a body dealing with equal treatment.³⁶ So far, no concept has been developed to implement Art. 13 of the Race Equality Directive.³⁷ Most of the conceptual work in the implementation process still has to be done.

D. Subsequent Development

The publication of the Discussion Draft Law on the Prevention of Discrimination in the Private Sector led to different reactions. Non-governmental organizations working in the field of anti-discrimination pointed out that the draft does not meet the requirements of the Race Equality Directive and voted for the adoption of a single act against discrimination.³⁸ The legal literature is divided. Initially, some scholars

³⁵ The Commissioners for the Affairs of Foreigners (*Beauftragte für Ausländerfragen*), who work at the federal and at the *Länder* level, do not have the competency to fulfil the obligations deriving from the 'Race Equality Directive', Mahlmann, *Anti-Discrimination Legislation...*, 29.

³⁶ Apart from the legal obligation in the Race Equality Directive, the establishment of an independent human rights institution, dealing in particular with the issues of racism and racial discrimination was also recommended at the World Conference against Racism, Racial, Discrimination, Xenophobia and related Intolerance in Durban, see Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 31 August to 8 September 2001), Programme of Action, UN Doc. A/CONF.189/12, para. 90.

³⁷ Possible models for equal treatment bodies (*Gleichbehandlungsstellen*) and limits set by the Constitution are outlined in Rädler, *Verfahrensmodelle...*, 414-20.

³⁸ See *Stellungnahme der Anti-Diskriminierungsinitiativen aus Nordrhein-Westfalen zur Verhinderung von Diskriminierungen im Zivilrecht* (10 December 2001), <http://www.nrwgegendiskriminierung.de/de/docs/pdf/Stellungnahme-Netzwerk.pdf>.

endorsed the draft law.³⁹ Others claimed that the draft law violates not only the Constitution but is also contrary to common sense.⁴⁰ The Catholic and the Evangelic churches opposed the inclusion of “religion or belief” as a prohibited ground of discrimination.⁴¹ In February 2002, the Federal Ministry of Justice introduced a revised Discussion Draft.⁴² Nevertheless, two months later it was decided to postpone the adoption of the anti-discrimination law due to the ongoing election campaign.⁴³ The draft was therefore not sent to the Federal Council (*Bundesrat*) and the Federal Parliament (*Bundestag*) for adoption.

The fear of members of the government of addressing an issue which might be unpopular in the time of an ongoing election campaign is, however, unfounded. Allegations that an anti-discrimination law violates common sense are not well founded at all. A recent survey conducted for the European Monitoring Centre on Racism and Xenophobia revealed that 38 per cent of the population in eastern Germany and 30 per cent of the population in western Germany supported the idea of outlawing discrimination by binding regulations.⁴⁴ In general, 37 per cent of the population in the European Union and 35 per cent of the Germans supported the idea of promoting equality of chances by political measures.⁴⁵

Also the Federation of German Trade Unions voted for the adoption of a single anti-discrimination act, see Stellungnahme des Deutschen Gewerkschaftsbundes,

<http://www.nrwgegendiskriminierung.de/de/docs/pdf/Stellungnahme-DGB.pdf>

³⁹ See Vennemann, “The German Draft Legislation...”, para. 23; more critical Wiedemann and Thüsing, “Fragen zum Entwurf...”

⁴⁰ Karl-Heinz Ladeur, “The German Proposal of an ‘Anti-Discrimination-Law’: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann”, 3 *German Law Journal* ((5) 1 May 2002), at http://www.germanlawjournal.com/past_issues_archive.php; Klaus Adomeit, “Diskriminierung – Inflation eines Begriffs”, 55 *Neue Juristische Wochenschrift* (2002), 1622, 1623; see also the statement of the German Lawyers’ Association, Stellungnahme des Deutschen Anwaltsvereins durch den Ausschuss Zivilrecht zum Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierung im Zivilrecht (Berlin, 13 February 2002),

<http://www.nrwgegendiskriminierung.de/de/docs/pdf/Stellungnahme-DAV.pdf>.

⁴¹ See Cathrin Kahlweit, “Das „Antidiskriminierungsgesetz“ ist vorerst gescheitert – Benachteiligt sind irgendwie alle“, *Süddeutsche Zeitung* (9 April 2002).

⁴² Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierung im Zivilrecht; Überarbeitung auf Grund der Besprechungen und Stellungnahmen, (17 February 2002).

⁴³ See Nicole Janz, Bundestag im Wahlkampf – Nichts geht mehr, SPIEGEL ONLINE (17 June 2002). <http://www.spiegel.de/politik/deutschland/01518,201263,00.html>. The elections took place on 22 September 2002.

⁴⁴ See Stefan Seibert, “Einstellungen gegenüber Minderheiten in der Europäischen Union”, 7 *Menschenrechtsmagazin* ((1) 2002), 17, 26. A more detailed analysis of the data is given in Eva Thalhammer, Attitudes towards Minority Groups in West and East Germany, European Monitoring Centre on Racism and Xenophobia (Vienna, April 2001),

http://www.eumc.eu.int/publications/eurobarometer/east-west-ger_en.pdf.

⁴⁵ See Stefan Seibert, *ibid.*, 22.

Beside the fact that Germany has the legal obligation to adopt an anti-discrimination law in order to implement the Race Equality Directive, it ought continue the process in order to send a political signal. The interruption is inconsistent with previous official statements. In its report regarding the human rights policy, the federal government stated that one of the primary issues for the implementation of the Programme of Action, adopted by the World Conference against Racism, Racial, Discrimination, Xenophobia and related Intolerance in Durban is the adoption of measures against racial discrimination regarding job search and in the working environment.⁴⁶

The adoption of the Coalition Agreement on 16 October 2002 led to a new development. It is now planned to use the draft act as basis for an anti-discrimination law, which implements Directives 2000/43/EC and 2000/78/EC.⁴⁷

IV. Standards for Modern Anti-Discrimination Legislation in Constitutional and European Law

A. Legal Basis for Testing the Compliance of an Anti-Discrimination Act with Higher-Ranking Law

Although it seems that the Draft Law on the Prevention of Discrimination in the Private Sector will not be adopted in the present version, some issues raised in the debate – sometimes in a very irrational way – should be clarified. The main point of criticism against the anti-discrimination draft law is that its provisions violate the Constitution, in particular the guarantee of private autonomy, freedom of action (both Art. 2 (1) of the Basic Law), the right to freely pursue an occupation (Art. 12 (1) of the Basic Law), property rights (Art. 14 of the Basic Law) and freedom of association (Art. 9 of the Basic Law). The reversed burden of proof has also been criticized.⁴⁸

The question as to whether the draft law violates higher ranking law is not easy to answer. The draft law was primarily intended to implement secondary European Community law. It will be shown that as far as the Race Equality Directive has to be implemented, the legal basis for an assessment of the conformity with higher-ranking law is European Community law. As far as it is not possible to remove inconsistencies

⁴⁶ Sechster Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen, Berichtszeitraum 01.01.2000-31.03.2002, 45.

⁴⁷ Coalition Agreement (16 October 2002), 68.

⁴⁸ Stellungnahme des Deutschen Anwaltsvereins..., 2.

with the Basic Law, secondary European Community law prevails. On the other hand, the draft encompasses prohibited grounds of discrimination, which are not mentioned in the Race Equality Directive. As far as an anti-discrimination act goes beyond the scope of the Directives 2000/43/EC, 2000/78/EC and 76/207/EEC,⁴⁹ the legal basis for an assessment of its legality remains solely the Basic Law.

B. *European Community Law*

The question as to whether the German Federal Constitutional Court has the competency to examine whether secondary European Community law infringes upon the fundamental rights of the Basic Law has been a highly debated issue for a long-time. The German Federal Constitutional Court addressed this issue in the *Solange I*, *Solange II*, *Maastricht* and *Banana Market* decisions.⁵⁰ The Federal Constitutional Court pointed out in the *Solange II* decision:

As long as the European Communities, in particular European Court case law generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law...⁵¹

In the *Banana Market* decision the court affirmed:

Constitutional complaints and submissions by courts which put forward an infringement by secondary European Community Law of fundamental rights guaranteed in the Basic Law are inadmissible from the outset if their grounds do not show that the European evolution of law, including the rulings of the European Court of Justice has resulted in a decline below the required standard of fundamental rights after the *Solange II* decision.⁵²

⁴⁹ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Official Journal L 39 (14 February 1976), 40.

⁵⁰ The development is outlined in Jutta Limbach, "Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe", 21 *HRLJ* (2000), 333, 335-7.

⁵¹ German Federal Constitutional Court 73 BVerfGE (1986), 339, 387 quoted in Limbach, *ibid.*, 336.

⁵² German Federal Constitutional Court 21 *HRLJ* (2000), 251.

The court went on:

The constitutional requirements are satisfied in accordance with the preconditions mentioned in [*Solange II*] if the rulings of the European Court of Justice generally ensure effective protection of fundamental rights as against the exclusive powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights.⁵³

In sum, the Federal Constitutional Court does not examine Constitutional complaints and submissions by courts which put forward an infringement by secondary European Community law of basic rights in the Basic Law as long as European Court case law generally ensures effective protection of fundamental rights. The standard of protection of fundamental rights in European Community law does not have to be equivalent to the standard enshrined in the Basic Law. It is sufficient if the European Court of Justice generally provides the protection of human rights. The former President of the Federal Constitutional Court Jutta Limbach recently specified, which minimum fundamental freedoms must be protected by the European Court of Justice. These are in the first place “the very core of the right to freedom” and the “right to equality”; in the second place the freedom of opinion, freedom of the press, freedom of assembly, the professional freedom and the right to property, although they might be interpreted differently than in national constitutions.⁵⁴

While a first reading of the relevant passages in the *Solange II* decision might lead to the conclusion that the Federal Constitutional Court addresses only procedural issues, in fact the decisions go further. The *Solange II* decision has to be interpreted as a statement with a substantive effect. As long as human rights are generally protected in European Community law, secondary European Community law has primacy over fundamental rights in the Basic Law.⁵⁵

The next question to be discussed is whether these principles apply only to regulations and decisions or also to directives. An answer can be found in the *Tabak-Richtlinien* Decision of the Federal Constitutional Court where it came to the following conclusion:

⁵³ *Ibid.*, 254.

⁵⁴ Limbach, “Inter-Jurisdictional Cooperation...”, 337.

⁵⁵ Ulrich Everling, “Brauchen wir ‘Solange III’? – Zu den Forderungen nach Revision der Rechtsprechung des Bundesverfassungsgerichts”, 25 *Europarecht* (1990), 195, 202.

The directive ... obliges the member states to implement its contents in national law, but it leaves a wide margin of appreciation. The national legislator is bound by the standards of the Basic Law. The question whether an implementation law within this margin of appreciation violates basic rights can be examined by the Constitutional Court without restrictions.⁵⁶

Thus, as far a directive leaves a margin of appreciation, the legislator has to make sure, that the implementation law complies with the fundamental rights in the Basic Law. However, if a directive leaves no other option, the legislator has to deviate from the fundamental rights in the Basic Law.⁵⁷ The drafting of an anti-discrimination law must be guided by the following principles. The legislator has to find a way by which the directive can be implemented without an infringement of the basic rights. If such infringement cannot be avoided, the directive has to be implemented even if the implementing act violates basic rights. But a careful consideration shows that it is possible to implement the Race Equality Directive without infringing the constitution.

C. *Constitutional Law*

1 Private Autonomy and Freedom of Contract

The principle of private autonomy in general and the freedom of contract is one of the most important principles in the German legal order. It is ensured by Art. 2 (1) of the Basic Law.⁵⁸ However, the freedom of contract is not unlimited. Limits are enumerated in the second part of Art. 2 (1) and comprise the rights of others, the constitutional legal order and morality. The freedom of contract is limited by rights of others.⁵⁹ In the legal literature it is accepted that the principle of private autonomy can be restricted when a weaker party has to be protected or when fundamental rights or rights which are equivalent to fundamental rights (*grundrechtsgleiche Rechte*) are infringed.⁶⁰ Under specific circumstances, even an imposed obligation to enter into a contract (*Kontrahierungszwang*) is permissible. An obligation to enter into a contract,

⁵⁶ German Federal Constitutional Court, 43 *Neue Juristische Wochenschrift* (1990), 974 (translation by the author).

⁵⁷ Everling, "Brauchen wir 'Solange III'...", 212-3.

⁵⁸ See Philip Kunig, Art. 2, margin note 16, in Ingo v. Münch and Philip Kunig (eds.), *Grundgesetz-Kommentar* (Munich, 5th edition, 2000).

⁵⁹ Rights of others are fundamental rights and rights, which are equivalent to fundamental rights, *ibid.*, margin note 20.

⁶⁰ Karl Larenz and Manfred Wolf, *Allgemeiner Teil des Bürgerlichen Rechts*, (Munich, 8th ed., 1997), 42.

which can be developed from the principle of a social state based on the rule of law (*Sozialstaatsprinzip*), exists regarding essential services for the public, e.g. supply of electricity and public transport.⁶¹ It may exist also in fields outside of the supply of goods and services regarding essential needs. One case discussed in the legal literature is the case of racial discrimination. Some authors argue that the obligation to enter into a contract can be developed from the value system of the Basic Law, namely Art. 1 and 3.⁶² Other authors rely on Section 826 of the Civil Code.⁶³ The Discussion Draft Law was much narrower and did not introduce an obligation to enter into a contract. Thus, the implementation of the Race Equality Directive will not lead to conflict between constitutional and European Community law.

2 The Reversed Burden of Proof

More difficulties are raised by the introduction of the principle of the reversed burden of proof. The Race Equality Directive leaves only a small margin of appreciation. Section 319c of the proposed amendment to the Civil Code stayed therefore close to the wording of Art. 8 (1) of the Race Equality Directive, according to which “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination” and “it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”.

The introduction of a system of a reversed burden of proof may lead to an interference with basic rights of the respondent. From the perspective of constitutional law, the fair trial guarantee, the principle of proportionality (both deduced from the *Rechtsstaatsprinzip*), the right to a hearing in accordance with the law (Art. 103 (1) of the Basic Law) and the principle of equality of arms (Art. 3 of the Basic Law) have to be taken into consideration.⁶⁴

⁶¹ *Ibid.*, 648.

⁶² See Reinhard Bork, Vorbemerkungen zu §§ 145 ff., margin note 24, in Julius von Staudinger (founder), Günther Beitzke (ed.), *Kommentar zum Bürgerlichen Gesetzbuch*, §§ 134-163 ff., (Berlin, 13th edition, 1996)

⁶³ Helmut Heinrichs, Einf. v. § 145, margin note 10, in Otto Palandt (founder), *Bürgerliches Gesetzbuch* (Munich, 61th ed. 2002) and Karl Larenz and Manfred Wolf, *Allgemeiner Teil...*, 649.

⁶⁴ Michael Reinhardt, “Die Umkehr der Beweislast aus verfassungsrechtlicher Sicht”, 47 *Neue Juristische Wochenschrift* (1994), 93, 96-9.

A deviation from the ordinary rules according to which each party has the burden of proof for preconditions, which are favourable for it, is only consistent with the Basic Law if the application of the ordinary rule leads to serious and socially unbearable results.⁶⁵ In cases of racial discrimination, the victims have to be protected, since they are apparently the weaker side and particularly vulnerable,⁶⁶ and the retention of the ordinary rule might lead to socially unbearable results. It is also virtually impossible to assess the mental state and motivation of the respondent. But even if the legislator came to the result that the introduction of a reversed burden of proof is not proportional, a provision similar to Section 319c has to be adopted since it is required by secondary European Community law.

3 Excuse: Prohibited Grounds of Discrimination not Mentioned in the Race Equality Directive

As explained above, the legal basis for an assessment of the legality of an anti-discrimination act beyond the scope of secondary European law are solely the basic constitutional rights. In the discussion process regarding the Discussion Draft Law on the Prevention of Discrimination in the Private Sector and its conformity with the constitution, the introduction of “sexual identity”⁶⁷ as a ground for discrimination was considered a violation of the constitutional principle of the protection of marriage and family (Art. 6 (1) of the Basic Law).⁶⁸ This is in fact not the case. On 17 July 2002, the German Federal Constitutional Court approved the Equal Treatment Act regarding Homosexual Partnerships (*Lebenspartnerschaftsgesetz*). The Court came to the conclusion that the legislator has the mandate to protect persons living in a homosexual partnership against discrimination and to support the free development of their personality deriving from Art. 2 (1) and 3 (1), (3) of the Basic Law.⁶⁹ The decision can be interpreted as a signal. The Discussion Draft Law on the Prevention of

⁶⁵ *Ibid.*, 97.

⁶⁶ The concept of vulnerability is explained in Alexander H. E. Morawa, “Vulnerability as a Concept of International Human Rights Law”, 10 *Journal of International Relations and Development* (2002/3) (forthcoming).

⁶⁷ The term “sexual identity” is broader than the term “sexual orientation” and comprises discrimination against homosexuals, inter-sexuals and transsexuals, see Bundesministerium der Justiz, Diskussionsentwurf..., 38.

⁶⁸ Ladeur, “The German Proposal...”, para. 2; contested by Winkler, “The Planned German Anti-Discrimination Act...”, para. 8.

⁶⁹ BVerfG, 1 BvF 1/01 (17 July 2002), <http://www.bverfg.de>, para. 88. The decision is summarized in Russel Miller and Volker Röben, “Constitutional Court Upholds Lifetime Partnership Act”, *German Law Journal* ((8) 1 August 2002), http://www.germanlawjournal.com/past_issues_archive.php.

Discrimination in the Private Sector also encompassed the prohibited grounds of discrimination on gender, religion or belief and disability. Unlike the ground of sexual identity these are explicitly mentioned in Art. 3 (2) or (3). The constitutional mandate to outlaw discrimination encompasses, therefore, these grounds as well. Generally, an act which outlaws direct discrimination in the private sector on grounds of gender, sexual identity, religion or belief, and disability would be consistent with the Basic Law. Art. 2 (1) and 3 (1), (3) of the Basic Law encourage the legislator to adopt measures against direct discrimination on the grounds mentioned above.

V. Consequences of a Failure to Adopt an Anti-Discrimination Law in the Prescribed Period

Another issue to be discussed is the question of what the consequences will be if Germany (or another member state) should fail to comply with the Race Equality Directive in the time limit set by Art. 16. In this case it has to be examined whether the substantive part of the Race Equality Directive would apply directly.

Normally, directives do not apply directly. They “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.⁷⁰ Thus, directives influence the national law making process only indirectly.⁷¹ However, directives may apply directly when a member state fails to implement a directive in the prescribed period or where it implements the directive incorrectly. As constantly pointed out by the European Court of Justice, an individual may rely upon substantive provisions of a directive against a member state if the state fails to implement the directive by the end of the period prescribed or where a state implements a directive incorrectly, when they are unconditional and sufficiently precise.⁷²

Art. 2 as a whole and large parts of Art. 3 of the Race Equality Directive are unconditional and sufficiently precise. Art. 2 of the Directive contains a detailed definition of the terms “direct and indirect discrimination based on racial or ethnic origin”. Apart from Art. 3 (f), which is too vague, prohibited action is explained in

⁷⁰ See Art. 249 EC-Treaty.

⁷¹ See Arno Scherzberg, “Die innerstaatlichen Wirkungen von EG-Richtlinien”, 15 *JURA* (1993), 225.

⁷² See e.g. ECJ C-8/81, *Ursula Becker v. Finanzamt Münster-Innenstadt*, Judgment of 19 January 1982, [1982] ECR 53, para. 25 and ECJ C 103/88, *Fratelli Costanzo SpA v Comune di Milano*, Judgment of 22 June 1989 [1989] ECR, 1839, para. 29.

detail in Art. 3. National courts would be enabled to examine whether the facts brought to the court constitute an illegal act of discrimination within the scope of Art. 3 (a) - (e), (g) and (h) of the Race Equality Directive.

By contrast, Art. 15 of the Race Equality Directive leaves a wide margin of appreciation for member states regarding the sanctions that can be imposed for an illegal act of discrimination. Thus, Art. 15 is not sufficiently unconditional, since it requires the further act by the state of defining the sanctions, which have to be imposed.

Further, a directive which has not been implemented within the prescribed period, cannot impose obligations on individuals.⁷³ In other words, a directive has no direct, horizontal effect. Victims of an alleged act of discrimination cannot rely on the directive when the discrimination occurs in the private sector. However, in this case the victim of an illegal act of discrimination described in Art. 3 of the Race Equality Directive might have a compensatory claim against the member state which failed to implement the Race Equality Directive in the prescribed period.⁷⁴

As discussed above, apart from the legal consequences of a breach of European Community law, the interruption of the drafting process leads also to political damages. It would therefore be desirable if Germany continues the implementation process of the Race Equality Directive without delay.

⁷³ See e.g. ECJ C-91/92, *Paola Faccini Dori v Trecreb Srl.*, Judgment of 14 July 1994, [1994] ECR I, 3325, para. 20.

⁷⁴ The preconditions are outlined in ECJ, *Paola Faccini Dori v Trecreb Srl.*, para. 27. See also Ingo Saenger, "Staatshaftung wegen Verletzung europäischen Gemeinschaftsrechts", 37 *Juristische Schulung* (1997), 865-872.

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